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CHARLES ELMORE GROPLEY
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IN THE SUPREME COURT OF
THE UNITED STATES

OCTOBER TERM, 1943

No. 333

EARL MOORE, ET AL, *Petitioners*

VS.

ILLINOIS CENTRAL RAILROAD COMPANY,
Respondent

RESPONSE OF THE ILLINOIS CENTRAL RAILROAD
COMPANY TO THE PETITION FOR WRIT OF CERTI-
ORARI TO THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN
SUPPORT THEREOF.

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STATEMENT OF THE MATTER INVOLVED

The petitioner undertakes to state the matter involved in pages three, four, five and six of the petition but we cannot agree with the statement in full and believe that it would be of interest to the Court to state the matter involved as we view it.

The petitioner instituted this suit in the District Court of the United States for the Southern District of Miss. at Jackson, Mississippi, seeking to recover wages alleged to be due him from September 16, 1936 to June 1, 1942. The

said wages were claimed to be due by reason of the fact that the petitioner, who at one time had been employed by the respondent as a switchman in the Jackson, Mississippi yards, had been wrongfully discharged by the respondent and that the petitioner was still an employee of the respondent and entitled to wages as a switchman since he had continuously offered his services to the respondent, which services had been declined.

The respondent filed its answer in the District Court, and also filed its motion for a summary judgment on the pleadings, based upon the affirmative defense set up in its answer and the amendment thereto, and upon the complaint of the plaintiff together with the transcript of the record in the United States District Court at Jackson, Mississippi in Docket No. 8086, at law, *Earl Moore, Plaintiff Vs. Illinois Central Railroad Company, Defendant.* (See record pages 46 and 47.)

The affirmative defense set up in the answer was that the petitioner herein, Earl Moore, had filed his suit against the respondent herein, Illinois Central Railroad Company, for damages for his wrongful discharge from its employment in February 1933 and recovered the sum of \$4183.20 which was duly paid to him, and that in said former suit the said Earl Moore sued for all damages occasioned him by said wrongful discharge and he recovered in said suit damages to which he was entitled and that, therefore, the judgment in the former action became and was res adjudicata of the instant suit.

The motion for summary judgment was sustained. The petitioner appealed to the Circuit Court of Appeals for the Fifth Circuit where the judgment of the trial court was affirmed on June 17, 1943.

The contract upon which the petitioner sued in both

instances was a contract designated "Schedule of wages and rules governing yardmen and switchtenders," which contract was entered into by and between the Illinois Central Railroad Company and the Brotherhood of Railroad Trainmen. The agreement, among other things, provided that the said yardmen or switchtenders taken out of service should have the right to a hearing, and in case suspension or dismissal is found to be unjust, yardmen or switchtenders should be reinstated and paid for all time lost. The provision is found in Paragraph D of Article 22 of the contract found at record page 13. In the first case, *Earl Moore Vs. Illinois Central Railroad Company*, 312 U. S. 630, this Court held that Moore was entitled to be paid for a breach of the contract in that he had been discharged without cause. This Court designated the action as a suit for damages in the following language:

"Petitioner Moore, a member of the Brotherhood of Railroad Trainmen, brought suit for damages against respondent railroad company in a Mississippi State Court claiming that he had been wrongfully discharged."

(See *Earl Moore, Petitioner Vs. Illinois Central Railroad Co.*, 312 U. S. 630.)

As stated by the petitioner this suit is governed by the laws of the State of Mississippi.

It is true as stated by the petitioner that the rule in Mississippi is that a discharged employee may file a series of actions for wages as they become due or accrue without impinging upon the rule of *res judicata* but the Supreme Court of Mississippi has not held, as stated by the petitioner, that in a suit on a contract of employment of this nature that each action must be brought only for the previously accrued wages. On the contrary, the Supreme Court

of Mississippi holds that for breach of a contract of hiring the servant may sue and recover in one action all damages past, present and future. See *Pritchard Vs. Martin*, 27 Mississippi 305.

The petitioner in the former action sued for \$12,000.00 as damages for breach of his contract of employment. He was awarded the sum of \$4183.20.

He objected to the amount of the award and contended that his award should be increased on account of future damages which contention was, by the District Court, rejected.

The present suit is for wages alleged to have accrued to the petitioner since the filing of the former suit.

The petitioner states that the form of the former action in no way evinced any election to sue for future damages for breach of such contract and that this suit is not barred by such former action under the applicable rule in such cases in Mississippi. The form of the action, as well as the proceedings had in the case as reflected by the record, show that the petitioner in his first suit undertook to and did sue for and recover all damages sustained by him, past, present and future.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

As stated by the petitioner the jurisdiction of the District Court was founded on diversity of citizenship and the suit is controlled by the law of Mississippi. The action of the District Court of Mississippi was affirmed by the Circuit Court of Appeals on June 17, 1943.

The contract was made with a labor union with many members in the employ of the Illinois Central Railroad

Company, but it is denied that the decision of the Circuit Court of Appeals for the Fifth Circuit, or the decision of the District Court of Mississippi, which was affirmed by said Circuit Court of Appeals, established in the Federal Court a rule different from the State rule on this same question. It is denied that the decision of the Circuit Court of Appeals is untenable. And it is denied that said decision of the Circuit Court of Appeals decides an important question of local law in a way which conflicts with applicable and controlling decisions of the Supreme Court of Mississippi on the question presented. It is respectfully submitted that the decision of the Circuit Court of Appeals for the Fifth Circuit is supported by the decisions of the Supreme Court of the State of Mississippi, which is the court of last resort of said State, and instead of being in conflict with any of the decisions of the Supreme Court of the State of Mississippi, the decision is supported by and borne out by the decisions of the Supreme Court of the State of Mississippi: See *Pritchard Vs. Martin*, 27 Miss. 305.

The Supreme Court of Mississippi has held that where the period of employment is not fixed, and for that matter where the period of employment is fixed, a separate cause of action arises as each pay day arrives. The Supreme Court of Mississippi does not hold that an employee cannot sue in one suit for all wages due as well as for wages to become due under the contract. On the contrary, it holds that such an action is proper and permissible. *Pritchard Vs. Martin*, 27 Miss. 305.

In the case quoted from by the petitioner, *Thorne Vs. True-Hixon Lumber Company*, 167 Mississippi 266, 148 Southern 388, the Court states that separate suits *may* be maintained for accrued wages but no where in that opinion, or in any other opinion of the Supreme Court of Mississippi, does the Supreme Court hold that an employee *must* bring

a separate action for each month's wages or each week's wages as the same becomes due.

We respectfully submit that there is no real conflict between the Federal and State Court decisions on the question of res adjudicata and the petitioner should not be awarded the writ of certiorari applied for here, because there is no departure from or failure to apply the applicable or controlling decisions of the Supreme Court of Mississippi on the question involved herein.

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

We respectfully disagree with the statements contained in paragraph three of page eleven of petitioner's brief under the heading "Jurisdiction." The petitioner sued for \$12,000.00 in the former action but petitioner is mistaken in stating that no future damages were sought by that action. By examining the record pages 41 and 42 it will be seen that petitioner in the former suit sought to set aside the judgment giving him damages in the sum of \$4183.20 and moved the court to re-assess the damages, and among the reasons assigned therefor, the reason that "no future damages were awarded." And clearly the petitioner was seeking additional damages which he claimed as future damages. This motion contradicts the statement made by the petitioner that no future damages were sought. Not only that, but the petitioner took a cross-appeal from the judgment of the District Court in his former suit basing his appeal on the contention that the damages awarded him were not enough. (See record page 43.) This action of the lower court was affirmed by the Circuit Court of Appeals as well as by this Court and the amount of the damages which Moore was held entitled to receive was fixed at \$4183.20. The petitioner, Moore, in his first suit sued for \$12,000.00, far in excess of any amount then due him by reason of any day wage or monthly wage due him,

because, as the Circuit Court of Appeals points out in its decision, the \$12,000.00 which Moore sued for was more than \$3,000.00 in excess of any amount he would have earned had he worked every day from the date of his discharge to the date of the judgment. (See opinion of the Circuit Court of Appeals, record page 60.)

We deny that under the applicable decisions of the Supreme Court of Mississippi the petitioner is entitled to maintain this action for his wages alleged to have accrued and matured. We submit that when the petitioner, in his former suit, sued for damages for breach of his contract of hiring, he did not sue for wages then due, but he sued for all damages, past, present and future. We again deny the statement made at page 12 of petitioner's brief that the judgment of the lower court is in irreconcilable conflict with the controlling decision of the highest court of Mississippi on such questions. We again deny that the Circuit Court of Appeals has established one rule of *res judicata* in the Federal Court as opposed to a different rule in the State Court. And we respectfully deny that where the contract is for no definite or fixed period of time, the rule is that such suits must of necessity be brought only for the wages which have previously matured or accrued. The District Court and the Circuit Court of Appeals did not err in holding that the judgment in the former suit was a bar to the present action and we submit that the decisions are not in conflict with any decisions of the Supreme Court of Mississippi on the point. The cases cited under paragraph four of the heading, "Jurisdiction" are not applicable in the instant suit for the reason that each of the cases cited beginning with *Erie Railroad Company Vs. Thompkins*, 304 U. S. 64 and ending with *Moore Vs. Illinois Central Railroad Company*, 312 U. S. 630, is decided upon the proposition that the United States Court, in each instance, erroneously applied the general law covering a particular question

rather than deciding the question on the applicable state law.

In the instant case the Circuit Court of Appeals and the District Court passed upon and decided the case on the applicable law of the State of Mississippi as construed by the highest court of the State of Mississippi and, therefore, the cases cited are inapplicable and furnish no basis for the granting of the writ of certiorari prayed for in this case. The petitioner accurately quotes from the opinion of the Circuit Court of Appeals but states that such holdings recognize only in part the rule in Mississippi. The Circuit Court of Appeals held that for a breach of contract of hiring, the servant has at least two remedies under the Mississippi law:

"1. He may bring separate suits after the due date of each salary payment for damages due and unpaid on the date the suit is filed, or (2) he may bring one suit for all damages, accrued or to accrue in the future, growing out of the breach." (See record page 60.) The Court further held that the "entering of a final judgment in an action under the latter option prevents recovery in another action for breach of the same contract." The Supreme Court of Mississippi, in the case of *Pritchard Vs. Martin*, 27 Mississippi 305, in passing upon the right of a discharged employee to sue for past as well as future wages for unjustified breach of contract of hiring, said:

"The ground of this action is, that the defendant violated his contract with the plaintiff, and unjustifiably and without reasonable cause discharged him from his employment, and thereby caused a loss to him of his year's wages. It is well settled that where the employee is prevented by the employer, without reasonable ground, from performing his contract, he may sue upon the special contract and recover damages to

the amount of the actual loss sustained, which will consist of the value of the service rendered, and the damages sustained by the refusal to allow performance of the rest of the contract: 21 Wend. 457; 24IB, 304; 1 Gilm. 562; 2 Verm. 84; 1 Denio, 317; LB 602; Ib. 606; and that the action may be brought immediately upon the breach of the contract by the employer, and that the plaintiff may recover not only for damages actually sustained previous to the commencement of the action, but for such as may occur in consequence of, and after the breach, and within the contemplation of the contract. 4 Peters, 182; 9 Ala. R. 292."

This case has never been modified nor overruled by any decision of the Supreme Court of Mississippi. The decision of the Circuit Court of Appeals refers to this decision as will be seen by the reference to note two to the opinion of the Court, record page 59.

But the petitioner complains that the Circuit Court of Appeals cited no Mississippi cases to sustain the announcement that where a suit has been brought for all damages accrued and to accrue in the future growing out of the breach and judgment has been rendered thereon and said judgment paid, that the cause is then *res judicata* as to all claims for damages. While the Circuit Court of Appeals was under no duty to make such citation, ample authority exists in the decisions of the Supreme Court of Miss. In the Case of *Bates Vs. Strickland*, 139 Mississippi 636, the Supreme Court of Mississippi said:

"Appellant contends that the former cause is not *res adjudicata* of the questions involved in this cause, because they were not presented by the pleadings, nor passed upon by the court in that cause. It is true they were not specifically presented by the pleadings.

"In determining whether a question is res adjudicata the following principles of law should be kept in mind: That a judgment is presumed to be correct where there is any possible state of facts to justify it. Starling Vs. Sorrell, 134 Miss. 782, 100 So. 10; Duncan Vs. McNeill, 31 Miss. 704; Henderson Vs. Winchester, 31 Miss. 290; Cannon Vs. Cooper, 39 Miss. 784, 80 Am. Dec. 101.

"And that where a court has jurisdiction of the subject matter and the parties in interest, its judgment is not alone res adjudicata of the questions actually presented by the pleadings, but is also res adjudicata of all questions necessarily involved, and which could have been presented. Dean Vs. Board of Supervisors, 135 Miss. 268, 99 So. 563; Vinson Vs. Colonial and U. S. Mortgage Co., 116 Miss. 59, 76 So. 827; Harvison Vs. Turner, 116 Miss. 550, 77 So. 528; Hardy Vs. O'Pry, 102 Miss. 197, 59 So. 73; Fisher Vs. Browning, 107 Miss. 729, 66 So. 132 Am. Cas. 1917 C, 466."

And in the case of *Dean, et al Vs. Board of Supervisors of DeSoto County*, 135 Miss. 268, 280, 99 So. 563, the court said:

"Where a court has jurisdiction of the subject matter and parties to the cause, its judgment rendered in such cause is not alone res judicata of the questions actually presented by the pleadings, but all questions necessarily involved and which could have been presented."

And in the case of *Harvison Vs. Turner*, 116 Miss. 550, 77 So. 528, the Supreme Court of Mississippi said:

"Where the pleadings in a case present issues involved in said case which might have been litigated therein, as well as those actually litigated, they are res

adjudicata. *Hardy Vs. O'Pry*, 102 Miss. 197, 59 So. 73. It would therefore follow that, even if the lower court in the first case, through inadvertence or mistake, failed to pass upon the title and equities to the timber in Perry County, since it was a matter in issue in the pleadings and proper to decide in order finally to dispose of the litigation between these parties, by the decree it became *res judicata*."

Authorities could be multiplied on this point, but we think it can not be successfully controverted that the rule in Mississippi is the same as it is in all jurisdictions of which we have any knowledge, that when a litigant has submitted his cause to the Court and has been successful in his suit and has reaped the fruit of his judgment, he cannot then re-litigate the question of damages nor can he again require the defendant to respond in damages because, perchance, he thinks that he did not receive enough damages.

The Supreme Court of Mississippi is not alone in its holdings on this question. This Honorable Court in the case of *Frank H. Pierce Vs. Tenn. Coal, Iron and Railroad Company*, 173 U. S. 1, in passing upon a case where the railroad company promised to pay one of its employees who had been injured by its cars, certain wages and to furnish him with certain supplies as long as his disability to do full work continued by reason of his injuries, in settlement of the employee's claim for damages for the injuries and when the railroad company abandoned the contract and discharged the employee without cause, held that the employee might maintain an action, once for all, as for a total breach of the entire contract and might recover all that he would have received in the future as well as in the past if the contract had been kept, deducting, of course, any sum which he might have earned in the future. This court said:

"If these facts were proved to the satisfaction of

the jury, the case would stand thus: The defendant committed an absolute breach of the contract, at a time when the plaintiff was entitled to require performance. The plaintiff was not bound to wait to see if the defendant would change his decision and take him back into its service; or to resort to successive actions for damages from time to time; or to leave the whole of his damages to be recovered by his personal representative after his death. But he had the right to elect to treat the contract as absolutely and finally broken by the defendant; to maintain this action, once for all, as for a total breach of the entire contract; and to recover all that he would have received in the future, as well as in the past, if the contract has been kept. In so doing, he would simply recover the value of the contract to him at the time of the breach, including all the damages, past or future, resulting from the total breach of the contract. The difficulty and uncertainty of estimating damages that the plaintiff may suffer in the future is no greater, in this action of contract, than they would have been if he had sued the defendant, in an action of tort, to recover damages for the personal injuries sustained in its service, instead of settling and releasing those damages by the contract now sued on."

This case is not in conflict with the decisions of the Supreme Court of Mississippi, but on the contrary, is in line with the case of *Pritchard Vs. Martin*, 27 Miss. 305, hereinbefore quoted from.

The case of *Pritchard Vs. Martin*, 27 Miss. 305, was referred to and approved in the case of *Friedlander Vs. Pugh, Slocomb*, 43 Miss. 111 at page 119 of the report.

The petitioner disagrees with the statement in the opinion of the Circuit Court of Appeals, wherein it refers

to the declaration in the former suit by Moore and says:

"The declaration did not allege that Moore would have earned \$12,000.00 within the period from February, 15, 1933 to September 16, 1936."

We think that an examination of the declaration will bear the Court out in its statement. At record page 31 is found the allegation as to the damages which the plaintiff claims he suffered. The plaintiff does state that he would have earned the sum of \$12,000.00, except for the breach of contract, but he did not undertake to set out the period within which he would have earned the \$12,000.00. As a matter of mathematical calculation the plaintiff would not have earned \$12,000.00 at the rate of \$6.64 per day for the period between February 14, 1933 to September 16, 1936. The Circuit Court of Appeals said:

"Indeed, if he had worked every day in that period at the rate of pay alleged, he would have received less than \$9,000.00."

It is clear from the allegation of the declaration, based upon the actual rate of pay, that the plaintiff sought to recover, not only what he might have earned from the date of his discharge up to the filing of his first declaration, but he sought to recover a large sum in addition thereto, and when he was not awarded that sum, he sought a new trial as has been pointed out herein.

We submit that there is in the record sufficient evidence of the plaintiff's efforts to recover in the first suit all of his damages to warrant the court in so holding.

The Supreme Court of the State of Mississippi, which passed on the first case of *Earl Moore Vs. The Illinois Central Railroad Company*, in passing upon the case said:

"The appellant is not seeking to be restored to the appellee's employment nor does his complaint involve any question of discipline or policy arising under the contract. It includes only his right, vel non, to damages because of his alleged discharge by the appellee" (See Moore Vs. Illinois Central Railroad Co., 180 Miss. 286.)

In that case the Supreme Court reversed the lower Mississippi Court and when the case was reversed, the petitioner amended the ad damnum clause of his declaration so as to claim \$12,000.00 as damages, whereupon the case was removed to the District Court of the United States on the grounds of diversity of citizenship. That case was then tried in the District Court, appealed to the Circuit Court of Appeals, and finally to this Honorable Court where the decision of the District Court awarding Moore the sum of \$4183.20 was affirmed and that judgment was paid. In the District Court, in his opinion, the District Judge treated the case as one to recover full damages for the breach of the contract and in that opinion, found at record page 34 to 37 inclusive, he said:

"I think the rule of damages is that the plaintiff is entitled to recover all damages that he suffered as a proximate result of the breach of the contract—not up to the time of the filing of the declaration, but for all damages that accrued to him as a proximate result of the breach less any amount that he may have earned for himself."

And the District Court further considered that the suit was for damages, past, present and future, as shown by the same opinion, at page 36 of the record herein, where the Court says:

"The records show that he (Moore) was employed

in November 1936, at a salary of \$105.00 per month, which, of course, is more than he would have earned had he continued in the employment of the Railroad Company."

And in the same case the District Court made findings of fact and conclusions of law, which will be found at record pages 37 to 41, inclusive. (Page 39 for finding of fact.)

By finding of fact No. 11, the Court found:

"11. That by a breach of the contract the plaintiff has suffered damages, but that he has not shown by the evidence that he would have worked every day and is not entitled to establish his damages by the number of days that were worked by Cutler."

By finding of fact No. 15, the Court found as follows:

"15. That in November 1936, plaintiff was employed by the Government at a salary of \$105.00 per month and has not suffered any damages by reason of the breach of the contract since that time."

By its conclusions of law, the Court found as follows:

"3. The contract in the present case was a valid contract and the plaintiff was entitled to sue for a breach thereof, as was held in the case of Moore Vs. I. C. R. R. Co., 176 So. 593; McGlohn Vs. G. & S. I. R. R. Co., 174 So. 250."

And by its conclusions of law No. 4, the Court said:

"The rule of damages is that the plaintiff is entitled to recover all damages that he suffered as a proximate result of the breach of the contract, less any amount that he may have earned for himself."

After the District Judge had made his findings of fact and conclusions of law and awarded to the plaintiff, Moore, judgment in the sum of \$4183.20, Moore filed a motion for a new trial seeking to have his damages re-assessed and one of the grounds of said motion was that no future damage was awarded. (R. page 41). That motion was overruled. (R. page 42.) From that action of the District Court, Moore took an appeal to the Circuit Court of Appeals (Record page 43) and the Circuit Court of Appeals affirmed the case on Moore's appeal.

We have, therefore, plaintiff suing for \$12,000.00 which is a great deal more than the total of his wages for the period from the date of his discharge to the date of the filing of his suit, contending that the damages awarded to him on his claim were insufficient.

He perfected his cross-appeal to the Circuit Court of Appeals and in briefing his case, he still contended that the action was one for a lump sum for the breach of his contract of employment. At page one of his brief, filed in the Circuit Court of Appeals, at record page 44, he said:

"It will be noted from the declaration (Tr. pp 1-3) that this is a suit by Moore, appellee, against the Illinois Central Railroad Company, appellant, for a lump sum for damages for the breach of a contract of employment."

And in the same brief, at page 23, record page 44, he said:

"The cases cited by appellant are not cases involving the individual personal and property rights of an individual which he has sought to enforce in court. They are not cases wherein a discharged employee, who by reason of such discharge, has long since lost all of his rights as an employee, has brought suit in a

Court of law seeking to recover a lump sum of money as damages for his wrongful discharge in breach of his contract of employment as is involved in the instant case."

And again on page 47 of his brief, record page 45, he said:

"The District Court in awarding appellee damages followed the correct rule of law, to-wit: That is, appellee was entitled to recover all damages suffered as a proximate result of the breach of contract, less any amount which he may have earned for himself."

And again on page 51 of his brief, record page 45, he said:

"Thus, it was right, just and proper that appellee recover not only what he had actually lost in wages by reason of his wrongful discharge up to the time of the trial, but in addition thereto a reasonable amount as damages on the basis of his future loss."

Can it be doubted, in the light of the foregoing, that the issue in the case as made by the pleadings and as made by the plaintiff's contentions, was, whether there was a breach of the contract and if so, that the damages sought were for past, present and future damages?

The Circuit Court of Appeals in deciding the former suit of *Illinois Central Railroad Company Vs. Moore*, 112 Federal 2d 959, in the majority opinion, at page 962 of the report, said:

"On September 25, 1936, Moore sued the Illinois Central Railroad Company in a court in Mississippi for damages for his discharge"

The dissenting Judge of the Circuit Court of Appeals held that the suit was one for damages for breach of contract. (See 112 Federal 2d 967.)

The petitioner herein, Moore, sought a review of the decision of the Circuit Court of Appeals in the first case and in his petition to this Court for certiorari, at page 2 thereof, said:

"Petitioner filed his suit here involved against the respondent railroad company for a lump sum as damages for the breach of a contract of employment." (Record 45.)

And again in his brief on certiorari he states, at page 9 of said brief:

"This suit was and is clearly a suit for damages for the breach of said written contract." (Record 45.)

This Honorable Court granted certiorari and the plaintiff, Moore, petitioner, filed in the Supreme Court a brief and in that brief he made certain statements as to the nature of the suit. On page 4 of that brief, we find: (Record 46)

"It will be remembered that this is a straight-out action at law, a suit for damages for the alleged wrongful breach of a contract of employment, which said breach arose on February 15, 1933; a suit by a discharged employee because he was discharged in violation of his contract of employment. He is in no sense seeking reinstatement. This is not a dispute growing out of a grievance, or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions. After February 15, 1933, petitioner was no longer an employee of the respondent."

And on page 5 of his brief we find the following: (Record 46)

"We respectfully submit that a suit as is this by a discharged employee for damages for a wrongful breach of a contract of employment does not come within the purpose as set forth.

"Here as discharged employee, who by reason of such discharge, has long since lost all of his rights as an employee, has brought suit in a court of law seeking to recover a lump sum of money as damages for his wrongful discharge in breach of his contract of employment."

This Honorable Court in its opinion in the former case, *Earl Moore Vs. Illinois Central Railroad Company*, 312 U. S. 630, said:

"Petitioner Moore, a member of the Brotherhood of Railroad Trainmen, brought suit for damages against respondent railroad company in a Mississippi State Court, claiming that he had been wrongfully discharged"

The District Court and the Circuit Court of Appeals in the instant case had before it the record in the former suit as well as the record in this case, including the brief herein before quoted from. See Stipulation R-28, R. 44-45-46. And with this evidence before it, the District Court found that the petitioner did in his former suit sue for all damages past, present and future and this decision of the District Court was affirmed by the Circuit Court of Appeals. There is nothing in the record to the contrary, and the petitioner in the instant case has not pointed out any fact which would justify this court in holding that the lower court erred in finding as a matter of fact that the plaintiff did sue for all damages in the prior suit.

Petitioner boldly asserts, in the face of the record, that future damages were not claimed and that the former action was merely one for wages which had accrued, but we respectfully submit that the record does not bear out that assertion, but on the contrary, the record shows that the petitioner sued for past, present and future damages and sought to recover full damages in the former action and the judgment in the former action has been paid. The petitioner now seeks to re-litigate the question of damages. At page 18 of his brief, the petitioner claims that he has elected to treat himself as an employee of the Company since the date of his discharge, but we respectfully submit that the petitioner and his counsel have evidently overlooked the statement made in the former case that the plaintiff was a discharged employee with no further rights as an employee, that he was not seeking reinstatement but was merely seeking damages for his wrongful discharge. (See R. 45-46).

The first declaration did seek more than the wages which would have been due at the time the suit was filed, as a mathematical calculation will demonstrate, and it is no answer to the contentions that future damages were sought to say that it could not be known how long the employee would be out of employment or how much he could earn elsewhere during his unemployment and that it could not be known when the contract would be terminated and there could be no means of calculating damages without knowing the period of unemployment.

This Court has settled this question adversely to the contentions of the petitioner as pointed out in the case of *Pierce Vs. Tenn. Coal, Iron and Railroad Company*, 173, U. S. 1, 43 U. S. Law Ed. 591, as the court said:

"The difficulty and uncertainty of estimating damages that the plaintiff may suffer in the future, is no

greater in this action of contract, than they would have been if he had sued the defendant, in an action of tort, to recover damages for the personal injuries sustained in its service, instead of settling and releasing those damages by the contract now sued on."

The Supreme Court of Mississippi in the case of *Montgomery Ward and Company Vs. Hutchinson*, 173 Miss. 701, says that a party breaking a contract cannot escape liability because of the difficulty in finding a perfect measure of damages. It is enough, says the court, that the evidence furnishes data for an approximate estimate of the amount of such damages.

So the argument that the plaintiff in the former suit would have had difficulty in measuring his damages will not stand.

We deny that the lower court has extended the rule of res judicata beyond any limit in Mississippi and we deny the lower court failed to apply the true rule of res judicata.

The cases cited by the petitioner such as *Cantrell Vs. Lusk*, 113 Miss. 137 which was a suit for recurring trespass, or *Eminent Household of Columbian Woodmen Vs. Bunch*, 115 Miss. 512 which was an action to recover total and permanent disability, which was brought at a later date than a previous action for disability, or the case of *Commercial Credit Company Vs. Newman*, 189 Miss. 477, which was a suit in replevin on an installment contract wherein a second action was instituted after failure of a suit on a former installment, are not in point here. Those are cases where there was a continuing trespass and each day that trespass continued, there was a separate cause of action, or where there was a separate cause of action on each installment, but none of the authorities above cited are similar to the case under consideration.

The lower court found from the facts, and the Circuit Court of Appeals affirmed the finding, that the plaintiff sued for past, present and future damages, embracing in his first suit all of the claims embracing any particular periods of time. Such holding is not in conflict with *Williams Vs. Luckett*, 77 Miss. 394. There Luckett sued only for the wages due but did not undertake to sue for future wages and the Court held that one suit for wages would not bar a suit for wages that became due after the first suit was tried and judgment rendered.

That ruling is recognized as correct but the Circuit Court of Appeals, in its opinion in the instant suit says that there are at least two alternative remedies under the law in Mississippi which may be invoked by a discharged employee. One, to sue for wages as they accrue, as was held in the case of *Williams Vs. Luckett*, 77 Miss. 394, or two, sue for the breach of the contract and recover in one action all damages past, present and future, as was held in the case of *Pritchard Vs. Martin*, 27 Miss. 305.

Clearly an examination of these authorities will show that the Circuit Court of Appeals correctly recognized and applied the decisions of the highest court of the State of Mississippi.

The case of *Thorne Vs. True-Hixon Lumber Company*, 167 Miss. 266, is not in conflict with holdings of the Circuit Court of Appeals in the instant case. In the True-Hixon Lumber Company case, the court recognizes the rule that where wages are to be paid in installments, several suits *may* be maintained for accrued wages, but it does not hold in the True-Hixon Lumber Company case that a discharged employee may not maintain one suit and recover all damages accrued and to accrue for breach of a contract of hiring. On the other hand, the Courts of Mississippi recognize that right as is held in *Pritchard Vs. Martin*, 27 Miss. 305,

Friedlander Vs. Pugh, Slocomb and Co., 43 Miss. 111. In the case of *Batesville Southwestern Railroad Company Vs. Vick*, 134 Miss. 480, the Supreme Court of Mississippi, in passing upon the measure of damages which a discharged employee may recover, says that he is entitled to recover the amount he would have received if he had been permitted to keep his contract, less what he has earned in the meantime or what he might have earned in time spent in seeking employment.

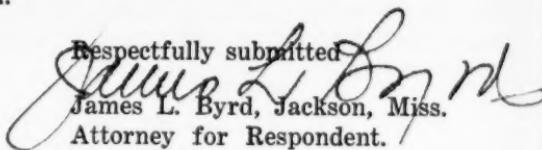
One vital point which the petitioner overlooks is that the District Court in the former suit held as a matter of fact that the plaintiff would not suffer any damages in the future by reason of his discharge because of the fact that he, Moore, was employed in November, 1936 by the U. S. Government at a salary of \$105.00 and has not suffered any damage by reason of the breach of the contract since that time. (See record page 40). The Circuit Court of Appeals affirmed this decision of the lower court since it affirmed the case on cross-appeal by the petitioner, Moore, and the Supreme Court of United States affirmed that finding because it reinstated the judgment of the District Court and awarded to Moore the original amount found to be due him by the District Court, to-wit: \$4183.20.

CONCLUSION

We respectfully submit that an examination of the record in this case will show that the District Court found from the evidence that the plaintiff in his first suit recovered all damages to which he was entitled, past, present and future, and that this finding was approved by the Circuit Court of Appeals in affirming the case in accordance with the applicable law of the State of Mississippi as announced by the Supreme Court of Mississippi, the highest court of the State of Mississippi, and that when the record is considered, it will readily appear that the instant case is

merely an attempt on the part of the petitioner to re-litigate the question of his damages which has heretofore been litigated and which has heretofore resulted in a judgment for the petitioner, which has been paid and satisfied.

We respectfully submit that the petition for certiorari should be denied.


Respectfully submitted
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